

EX PARTE OR LATE FILED

CARTER, LEDYARD & MILBURN

COUNSELLORS AT LAW

1350 I STREET, N. W.

SUITE 1010

WASHINGTON, D. C. 20005

2 WALL STREET
NEW YORK, N. Y. 10005
(212) 732-3200

(202) 898-1515

FAX: (202) 898-1521

DOCKET FILE COPY ORIGINAL

114 WEST 47TH STREET
NEW YORK, N. Y. 10036
(212) 944-7711

January 13, 1998

RECEIVED

JAN 13 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: **Notice of Ex Parte Presentation**
Direct Broadcast Satellite Public Service Obligations
MM Docket No. 93-25

Dear Ms. Salas:

This is to provide notice that Richard H. Waysdorf, Senior Counsel, Affiliate Relations, of Encore Media Group LLC ("Encore") and Robert L. Hoegle, counsel for Encore, met on January 12 with Ari Fitzgerald, Legal Advisor to Chairman Kennard regarding the above-referenced proceeding. An original and one copy of this letter and enclosure are being submitted to you for inclusion in the record in this proceeding, and copies are being provided to Mr. Fitzgerald.

During the meeting, we discussed the application of the proposed rules in this proceeding to WAM! America's Kidz Network and the current status of the proceeding. We generally reviewed the subjects set forth in the enclosed summary and our August 21, 1997 letter to Mr. Fitzgerald, which was submitted for inclusion in the record previously.

If you have any questions regarding the above information or enclosure, please contact the undersigned.

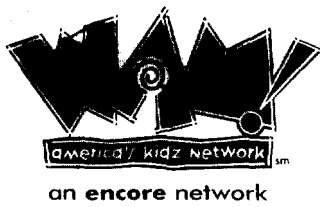
Very truly yours,

Robert L. Hoegle (TH)

Robert L. Hoegle

RLH:slf
Enclosure
cc: Ari Fitzgerald, Esquire (w/encl.)

No. of Copies rec'd 041
List A B C D E



**ENCORE MEDIA GROUP'S WAM!AMERICA'S KIDZ NETWORK
SHOULD QUALIFY AS DBS PUBLIC INTEREST
"EDUCATIONAL AND INFORMATIONAL PROGRAMMING"**

- I. The Commission has the discretion to craft the implementation of Section 335(b) of the Communications Act to respond to current policy goals and to the current competitive environment.**
- II. The Commission should promote efforts by public-private partnerships such as WAM! to meet the educational needs of children.**
 - Through WAM!, Encore has developed a corporate sector solution to the urgent public need for privately funded educational resources. WAM! is the only full time, completely commercial-free network dedicated to educating and instructing by engaging the interests and needs of an underserved 8 to 16 year old audience.
 - WAM! has earned many accolades and awards from educators and other children's programming experts, recognizing WAM!'s exceptional educational programming.
 - WAM!'s schedule includes at least twelve hours of noncommercial educational academic programming for adolescents each weekday, a private sector commitment unduplicated by any other network, institution, broadcaster, or channel, as well as many additional hours each day of informational, arts, developmental, and entertainment series aimed at guiding, motivating, and enlightening this target youth audience.
 - WAM! has been cleared for carriage on "basic" tiers and may be carried separately from other Encore channels.
 - Encore's WAM! network is an initiative that should serve as the model of public service for the video programming industry in general, and for DBS systems in particular.
 - Only a private programming corporation like ENCORE can afford to incubate such a targeted service which capitalizes on the promise of television, to harness the power of television to teach, to inspire, and to inform.
 - The definition of "noncommercial programming of an educational or informational nature" should be crafted in such a way that WAM!'s valuable noncommercial educational programming would satisfy the minimum programming requirements adopted for implementing Section 335(b)(1).

III. The noncommercial educational or informational programming required to be carried by DBS systems should not be limited to that supplied by publicly funded entities, to the exclusion of public-private partnerships.

- The central issue is whether programming supplied by a privately-funded programmer may satisfy the Section 335(b)(1) requirement that DBS systems devote 4% to 7% of their channel capacity to “noncommercial programming of an educational or informational nature.”
- Congress did not intend that Section 335(b)(1) should be an exclusive concession to the publicly funded broadcast and educational institutions.

IV. Congress’s real concern was that such programming be *noncommercial*, not that the programming be provided exclusively by *nonprofit* entities.

- Many studies and experts have expressed great concern over the impact of commercial advertising on children’s educational programming -- no one has ever raised concerns over the nonprofit or for-profit nature of the program producer.
- The better policy is to focus the quality and *noncommercial* nature of educational and informational programming, rather than on the program providers’ non-profit or for-profit status. This approach is consistent with the Court of Appeals’ pronouncement in its decision upholding Section 335, that “Section [335] . . . represents nothing more than a new application of a well-settled government policy of ensuring public access to *noncommercial* programming.” Time Warner Entertainment Co. v. FCC, 93 F.3d 957, 976 (D.C. Cir. 1996) (emphasis added).

V. There is no valid policy justification for excluding programming supplied by privately funded programmers from satisfying DBS educational programming requirements under Section 335(b)(1).

- Many of the producers of programming carried on noncommercial broadcast stations are for-profit entities, while many of the producers of programming carried on WAM! are nonprofit entities. For example, the MacNeil News Hour is produced by another company owned by Encore’s corporate parent, Liberty Media Corporation, while several of WAM!’s programs are produced by nonprofit or governmental entities such as the Agency for Instructional Television and TV Ontario.
- The overall quality of noncommercial educational programming which a DBS operator can present on Section 335(b)(1) reserved channel capacity will be optimized by allowing maximum choices from the largest possible quantity of educational programming, regardless of whether such noncommercial programming is produced or

packaged by a publicly or privately funded programmer.

- VI. The Commission should also reject the approach proposed by local PEG cable access programmers and regulators to convert the Section 335(b)(1) requirements into a cable-type PEG structure for DBS operations, with a national PEG access “clearinghouse” to take over and program all channels required to be reserved by DBS operators.**
- Adopting the PEG model for DBS would create the same failures that permeate the cable PEG access arena, specifically, creating capacity without effect.
 - While there are many fine exceptions, the legacy of PEG channels locally throughout the country is of channels laying fallow, of alphanumeric service listings repeated over and over without any real substance. Outside of a few big cities, only a small fraction of PEG channels actually air valuable educational or informational programming.
- VII. A reasoned legal interpretation of Section 335(b)(1) requires the conclusion that qualifying noncommercial educational programming should include programming from private companies such as Encore (see Encore’s August 21, 1997 submission).**